EME COURT, U. S.

73-526

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. [redacted]

ALASKA HELICOPTERS, INC., *Petitioner*

v.

LESTER M. ANDERSON, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX/TABLE OF CITATIONS

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INDEX TO APPENDIX

	Page
APPENDIX A—Supreme Court, Order dated June 28, 1973, in *Alaska Helicopters, Inc.* v. *Anderson*....	1a
APPENDIX B—Superior Court, Order Granting Reinstatement of Cause, dated August 17, 1972, in *Anderson* v. *Atlantic Richfield Co. and Alaska Helicopters, Inc.*	2a
APPENDIX C—28 U.S.C. § 1257	4a
APPENDIX D—Alaska Rule of Civil Procedure 60(b)..	4a

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Respondent, Lester M. Anderson, respectfully requests that the Petition for a Writ of Certiorari to the Supreme Court of the State of Alaska be denied.

OPINIONS BELOW

The relevant opinions are all unreported, and are attached as appendices as follows:

APPENDIX A—Supreme Court, Order, dated June 28, 1973, in *Alaska Helicopters, Inc.* v. *Anderson.*

APPENDIX B—Superior Court, Order Granting Reinstatement of Cause, dated August 17, 1972, in

Anderson* v. *Atlantic-Richfield Co. and Alaska Helicopters, Inc.

JURISDICTION

This petition is not within the jurisdiction of the Court because it is not taken in conformity with 28 U.S.C. § 1257(c) (App. C). The petition does not submit a federal question of substance as required by Supreme Court Rule 19(1)(a).

QUESTION PRESENTED

Whether a state court can exercise the discretion to reinstate a case pursuant to Alaska Rules of Civil Procedure 60(b)(6) which has previously been dismissed for reasons of gross misconduct of attorney.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case does not involve any constitutional provision, treaty, statue, ordinance or regulation.

Alaska Civil Rule 60(b)(6) (App. D) is the authority under which the Alaskan Courts reinstated the case.

STATEMENT OF THE CASE

On or about July 17, 1969, Lester M. Anderson was employed by Frontier Rock and Sand, and was engaged in construction work at an oil rig site on the North Slope owned by Atlantic-Richfield Company. On that date, Anderson was struck by the rear propeller of a Fairchild-Hiller helicopter owned and operated by Alaska Helicopters, Inc.

On October 9, 1969, an action entitled *Lester M. Anderson* v. *Atlantic-Richfield Company and Alaska*

Helicopters, Inc. was filed in the Third Judicial District, State of Alaska. Subsequently, the claim against Atlantic-Richfield Company was dismissed, with prejudice, by stipulation of the parties.

Respondent's suit against Alaska Helicopters, Inc. was dismissed, without prejudice, on July 12, 1971, for failure of the Respondent to answer interrogatories. Respondent Anderson submitted to the trial court his affidavit that he had returned to his then attorney, Thomas Curran, all interrogatories submitted to Respondent to answer. After the order of July 12, 1971, Respondent's attorney, Thomas Curran, moved twice to reinstate the action, but never informed Respondent that the case had been dismissed. Respondent was never informed by Thomas Curran even when discussing his case, that it had been dismissed. Respondent first learned his case had been dismissed in July, 1972, when he contacted new counsel. On July 11, 1972, Respondent, through new counsel, Hagans, Smith & Brown, filed his motion to reinstate his case, supported by affidavits and memoranda. Answers to all interrogatories were filed. On August 17, 1972, the Honorable C. J. Occhipinti reinstated the action pursuant to Alaska Rule of Civil Procedure 60(b)(6) (App. D). This reinstatement occurred less than a year after the case had been dismissed without prejudice for failure to answer interrogatories.

The Alaska Supreme Court discretionarily granted review of the trial judge's order granting reinstatement. After full briefing and oral argument, the Alaska Supreme Court denied the Petition for Review, thus upholding the exercise of discretion by the trial judge in reinstating the case.

REASONS FOR DENYING THE WRIT

I. This Petition Is Not Within the Jurisdiction of the Court Because It Does Not Raise a Federal Question.

This case is purely a matter of state court procedure in processing civil matters. The orders of the Alaska Supreme Court endorse the action of a trial level judge in reinstating a case previously dismissed without prejudice for failure to answer interrogatories. The authority for the Court's action is Alaska Rule of Civil Procedure 60(b). No federal law is involved in this matter.

Jurisdiction of the Supreme Court of the United States over final judgments rendered by the highest court of a state is defined by 28 U.S.C. § 1257(3) (App. C), and Supreme Court Rule 19(1)(a). In the matter before the Court, no question was raised as to the validity of a treaty or statute of the United States; no question was raised as to the validity of an Alaskan statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States; and, finally, no title, no right, no privilege nor immunity was specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States. In short, this case does not merit consideration by the Supreme Court of the United States because it does not meet the requirements of 28 U.S.C. § 1257(3), and Supreme Court Rule 19(1)(a), for review by writ of certiorari.

II. Interference with State Court Administrative Policy Is Unwarranted.

The petition complains of the act of the trial judge in reopening the case after interrogatories had been answered. The discretion to reopen the case is vested

in the trial court judge by Alaska Rule of Civil Procedure 60(b)(6) (App. D). The petitioner does not complain that the Alaska Rule is unconstitutional, but rather that the judge improperly exercised the discretion vested in his office by Rule 60. A determination of abuse of discretion by the trial judge in the application of a State procedural rule is not a proper subject for review by the Supreme Court of the United States of America. Second-guessing a trial judge in a discretionary matter is historically not a duty of this Supreme Court.

The trial judge had proper authority for his order to reinstate the case under Rule 60(b)(6), and proper case precedent for his act in *Citizens Bldg. & Loan Assn. of Montgomery Co.* v. *Shepard,* 289 A.2d 620 (D. C. Cir. 1972). The District of Columbia Court of Appeals held that gross and inexcusable conduct of attorneys is not imputed to their clients. This case is nearly on "all fours" with the case at bar. In *Citizens Bldg.,* Id., a default judgment was vacated five (5) years and nine months after it was entered. The original attorney for the defendant had ignored court orders to file an answer and the defendant's attorney had erroneously informed her that the suit was "progressing normally" after it had been dismissed. In the case at bar, the Respondent's original attorney ignored a court order to answer interrogatories, and he never informed the Respondent that the case had been dismissed. These acts, coupled with additional indiscretions on the part of the Respondent's original attorney, persuaded the Court to adopt the rationale of *Citizens, supra,* and the Court reinstated the Respondent's case. This exercise of discretion by the trial judge, which was fully supported by proper authority,

does not present a substantial federal question that merits review by the Supreme Court of the United States.

III. Petitioners Have Not Suffered Extreme, Inherent and Actual Prejudice.

The issue of prejudice was examined by the trial judge, and was briefed and addressed in oral argument before the Alaska Supreme Court. In both instances, the prejudice was considered to be negligible.

IV. Reinstating the Case Was Within the Permissible Range of the Court's Discretion.

The petitioner cites *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, reh. den. 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115 (1962), for the basic proposition that a party is deemed bound by the acts of his attorney. As is true of most "basic propositions", exceptions to the rule are recognized. These exceptions are defined in Rule 60(b) (App. D.) In situations where the acts of an attorney are gross and inexcusable, a citizen should not be bound, nor denied his day in court. *Citizens, supra.*

Link v. *Wabash Railroad Co., supra,* establishes the standard to be applied by the Supreme Court should it undertake to scrutinize the trial judge's act of discretion. As was recognized at Footnote 8, the test is:

> ". . . whether it was within the permissible range of the court's discretion."

Rule 60(b)(6) and *Citizens, supra,* clearly indicate that the act of ordering reinstatement of the case once the interrogatories had been answered was within the permissible range of the Court's discretion.

CONCLUSION

The petition does not present a federal question, nor does it present a federal question of substance that merits review by the Supreme Court. The trial judge had the authority to reinstate the case, and the Court acted within the permissible range of its discretion in so doing. At present, all interrogatories have been answered, and there has been compliance with all Court orders. The matter is proceeding to trial on the merits. Intervention by the Supreme Court at the present juncture is unwarranted.

Accordingly the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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